In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-379

PAUL POMPONIO AND PETER POMPONIO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners' convictions for interstate transportation of a fraudulently obtained security and of counterfeit securities were reversed on appeal. Petitioners contend that further review is warranted because the court of appeals did not reach their arguments that the evidence was insufficient to support their convictions and that it varied from the allegations contained in the indictment.

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of having transported interstate a fraudulently obtained check in the amount of $2,000,000 (Count IV) and counterfeit securities (Count V), in violation of 18 U.S.C.

2314.[1] Petitioners were each sentenced to two years' imprisonment. The court of appeals (Pet. App. 1a-6a) reversed the convictions of petitioners and their two co-defendants and remanded for a new trial because the trial court had not questioned the jurors concerning their possible exposure to prejudicial newspaper publicity that had appeared during the trial, as required in that circuit by *United States* v. *Hankish*, 502 F.2d 71 (C.A. 4).[2]

Petitioners now argue that the court of appeals should have reached the "main" contentions made by them with respect to Count IV of the indictment—that is, that the evidence relevant to the charge in Count IV was insufficient to support their convictions and that it varied from the allegations made therein.[3] Petitioners contend that the court of appeals, by declining to reach these issues, failed to meet its responsibilities under 28 U.S.C. 2106[4] and subjected them to retrial in potential violation of the constitutional prohibition against double jeopardy. These contentions are without merit.

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[1]Petitioners were acquitted of having caused a person to travel interstate in furtherance of a scheme to defraud him, in violation of 18 U.S.C. 2314 (Count II), and of having used an interstate communications facility in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1343 (Count III); the jury was unable to reach a verdict with respect to petitioners on an additional count of the indictment (Count I), which was then dismissed as to them by the trial court. Co-defendants Charles Piluso and Louis J. Pomponio were convicted on all five counts (Pet. App. 2a).

[2]The court of appeals also held Count V insufficient on its face and dismissed it without prejudice (Pet. App. 5a-6a).

[3]Charles Piluso has not petitioned for a writ of certiorari. The petition filed by Louis J. Pomponio is pending in No. 75-413.

[4]28 U.S.C. 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Although petitioners argued the sufficiency of the evidence and variance issues at length in their brief in the court of appeals—along with a multitude of others issues—the opening argument in their brief was directed to the issue of prejudicial publicity. Because of assertedly prejudicial pretrial publicity, petitioners claimed that "the interests of justice require a new trial" (Brief on Appeal, at p. 17). The court of appeals agreed with the contentions made by petitioners' co-defendants (and not disavowed by petitioners) concerning the trial court's treatment of prejudicial publicity that had appeared during the trial, and it therefore reversed petitioners' convictions.

Having sought and been granted the reversal of their convictions and a new trial, petitioners had no absolute right to any further review of their other claims in the court of appeals. Even assuming for purposes of argument that either the Double Jeopardy Clause or a sound application of 28 U.S.C. 2106 would have foreclosed a retrial had the court of appeals concluded that the evidence adduced at the first trial was insufficient to sustain a conviction (see *United States* v. *Wiley*, 517 F. 2d 1212 (C.A.D.C.); but see *Bryan* v. *United States*, 338 U.S. 552), it does not follow that the court of appeals was obliged to determine the merits of petitioners' insufficiency or variance claims. The matter of which claims of error should be reviewed in connection with a reversal for a new trial is one for the exercise of sound discretion by the appellate court. Cf. *Forman* v. *United States*, 361 U.S. 416, 425-426.

The holding in *United States* v. *Wiley*, *supra*, is not to the contrary. Indeed, the *Wiley* court relied for its decision upon the exercise of the discretionary powers conferred by Section 2106; such discretion properly encompasses the selection of issues to be determined on appeal when a

conviction is being reversed.[5] The thrust of petitioners' contentions is to require appellate courts to consider sufficiency issues whenever they are raised, even if a new trial has been ordered on other grounds and the merits of the sufficiency claim depend upon the prior resolution of other issues. An inflexible rule such as that contended for by petitioners is not justified by the policies inherent in the Double Jeopardy Clause, nor is it consistent with the discretionary powers conferred by Section 2106.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[5]The court in *Wiley* was concerned only with the appropriateness of a retrial following the reversal of the defendant's conviction because of insufficient evidence. No issue was raised in that case concerning a variance between the offense charged and the evidence, and the court of appeals consequently did not discuss the appropriateness of a retrial following the reversal of a conviction because of an evidentiary variance. The court in *Wiley* assumed, moreover, that retrial following a reversal because of insufficient evidence would not offend the Double Jeopardy Clause (see *Bryan* v. *United States, supra,* 338 U.S. at 560; *United States* v. *Ball,* 163 U.S. 662, 672; cf. *United States* v. *Tateo,* 337 U.S. 463), and based its decision instead on Section 2106.

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